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No. 72-386

IN THE

Supreme Court of the United States

..... TERM, 197..

WILBURN JEROME GERBERDING,
Petitioner,

vs.

HAROLD R. SWENSON, Warden,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The petitioner was originally convicted by a jury in 1953 of the crime of robbery in the first degree and sentenced to life imprisonment under the Missouri Second Offender Act which was in force at that time, Section 556.280, RSMo 1949. The opinion of the Supreme Court of Missouri affirming the petitioner's original conviction is reported as State v. Gerberding, 272 S.W.2d 230 (Mo. 1954).

The opinion of the Supreme Court of Missouri, reversing and remanding the trial court's original denial of the petitioner's motion to vacate judgment and sentence and providing that an evidentiary hearing should be held with respect to such motion is reported as **Gerberding v. State**, 433 S.W.2d 820 (Mo. 1968).

The opinion of the Supreme Court of Missouri, affirming the denial of the motion to vacate judgment and sentence is reported as **Gerberding v. State**, 448 S.W.2d 904 (Mo. 1970).

The Memorandum and Order of the United States District Court for the Western District of Missouri granting the writ of habeas corpus but staying its issuance on certain conditions, in Cause No. 18145-2 was handed down on April 24, 1970 by Judge Collinson sitting in United States District Court for the Western District of Missouri, Western Division, and said Memorandum and Order is unreported.

The opinion of the United States Court of Appeals for the Eighth Circuit reversing the District Court's Memorandum and Order granting the writ of habeas corpus is reported as **Gerberding v. Swenson**, 435 Fed.2d 368 (8th Cir. 1970). This Court denied certiorari, **Gerberding v. Swenson**, 403 U.S. 906 (1971).

On or about April 5, 1972, the petitioner filed a successive petition for writ of habeas corpus alleging the same ground for relief and said opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, is reported as **Gerberding v. Swenson**, 342 F.Supp. 1165 (1972). (Appendix A of Petition).

On June 13, 1972, the United States Circuit Court of Appeals, for the Eighth Circuit, denied certificate of probable cause (Appendix C of Petition).

JURISDICTION

The respondent hereby accepts the petitioner's jurisdictional statement.

QUESTIONS PRESENTED

Whether admission into evidence of a prior conviction, although valid at the time of its admission but subsequently became void, not used for impeachment purposes and not necessary to support enhancement of punishment because of other valid prior convictions received in evidence, constitutes harmless error?

Whether the petitioner's successive application for writ of habeas corpus, alleging the same ground for relief, is an abuse of remedy?

STATUTORY PROVISIONS INVOLVED

The Title 28, U.S.C.A., Section 1291, provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Title 28 U.S.C.A., Section 2253 provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review on appeal, by the court of appeals for the circuit where the proceedings is had.
>
> There shall be no right of appeal from such an order in a proceedings to test the validity of a warrant to remove, to another district or place for commitment or trial a person charged with a criminal offense against the United States or to test the validity of his detention pending removal proceedings.
>
> An appeal may not be taken to the court of appeals from the final order in habeas corpus proceeding where the detention complaint of arises out of process issued by a state court, unless the justice or judge who remanded the order or a circuit justice or judge issues a certificate of probable cause. . . ."

Section 56.280 RSMo 1949, provides:

> "If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense, which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, shall be punished as follows:
>
> '(1) If such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life;

(2) If such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense;

(3) If such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years.'"

Supreme Court Rule 27.26 provides:

"A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a)**Nature of Remedy.** This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set

aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b)**When Remedy May be Invoked.**

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c)**Form and Sufficiency of Motion.** A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d)**Successive Motions.** The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior applica-

tion or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e)**Hearing.** As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f)**Burden of Proof.** The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g)**Presence of Prisoner.** The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h)**Right to Counsel.** If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to

ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not already included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i)**Judgment.** The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j)**Appeal.** An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the motion as in a civil case as authorized by §512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k)**Costs.** If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the

evidence on that issue only so as to permit review of that issue by the appellate court.

(l)**Counsel on Appeal.** If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead."

STATEMENT

Petitioner is confined at the Missouri State Penitentiary under a judgment and sentence entered by the Circuit Court of the City of St. Louis, Missouri, on April 8, 1953 wherein he was convicted of robbery in the first degree and sentenced to life imprisonment in the penitentiary of the State of Missouri. A direct appeal was taken, and petitioner's conviction was affirmed by the Supreme Court of Missouri on November 8, 1954. That opinion is reported as **State v. Gerberding**, 272 S.W.2d 230 (Mo. 1954).

Thereafter, on February 9, 1968, petitioner filed his motion to vacate judgment and sentence pursuant to Supreme Court Rule 27.26, in the Circuit Court for the City of St. Louis, Missouri. On February 19, 1968, the Circuit Court overruled the motion to vacate on the ground that "the motion and files and records of the case conclusively showed that the prisoner is entitled to no relief." An appeal was taken from that order and the Supreme Court of Missouri reversed and remanded the cause for an evidentiary hearing. That opinion is reported as **Gerberding v. State**, 433 S.W.2d 820 (Mo. 1968).

On January 28, 1969, petitioner filed his amended motion to vacate judgment and sentence. An evidentiary hearing was held on February 14, 1969, and the motion to vacate was overruled on February 14, 1969. The denial of that motion was affirmed by the Supreme Court of Missouri on January 12, 1970. That opinion is reported as **Gerberding v. State, 448 S.W.2d 904 (Mo. 1970).**

On February 27, 1970, petitioner filed his petition for a writ of habeas corpus in United States District Court for the Western District of Missouri, Western Division. An order was entered by that court directing respondent to show cause and a response was filed thereto as was a traverse and reply to the response to order to show cause.

On April 24, 1970, the District Court entered its Memorandum and Order wherein it granted the writ of habeas corpus, however, stayed the issuance of the writ upon certain conditions.

On April 28, 1970, respondent filed its notice of appeal. On December 7, 1970, the United States Court of Appeals for the Eighth Circuit filed its opinion wherein the judgment of the United States District Court for the Western District of Missouri was reversed.

This court denied certiorari in **Gerberding v. Swenson, 403 U.S. 906 (1971).**

On or about April 5, 1972, the petitioner filed a successive petition for writ of habeas corpus in United States District Court for the Western District of Missouri raising the same ground for relief as was raised in his prior petition. The cause was transferred to the United States District Court for the Eastern District of Missouri and on

April the 26th, 1972, the United States District Court for the Eastern District of Missouri, Eastern Division in the case styled **Gerberding v. Swenson, 342 F.Supp. 1165 (1972)** denied the writ of habeas corpus. Thereafter, on May 12, 1972, the United States District Court for the Eastern District of Missouri denied petitioner's application for certificate of probable cause, and likewise on June 12, 1972, the United States Court of Appeals for the Eighth Circuit, denied the petitioner's application for a certificate of probable cause.

ARGUMENT

I

The admission into evidence of a prior conviction, valid at the time of its admission but subsequently became void, which was not used for impeachment purposes and was not necessary to support enhancement of punishment because of two other valid prior convictions received in evidence, is harmless error.

To demonstrate the validity of our position, we begin with a brief resume of the important facts. On February 1, 1972, an indictment was filed in the Circuit Court of the City of St. Louis, Missouri, wherein petitioner was charged with the commission of robbery in the first degree and applicability of the Second Offender Act was alleged. The indictment alleged petitioner had previously been convicted of three felonies, any one of which would be sufficient to invoke the application of the Second Offender Act. See Section 556.280, RSMo 1949.[1]

Trial was commenced on February 2, 1953, before the Honorable Waldo C. Mayfield, Judge in the Circuit Court of the City of St. Louis, Missouri. During the course of the state's presentation of its case in chief, evidence was introduced which was probative of the allegations in the indictment respecting the application of the Second Offender Act. The uncontested evidence was that petitioner had previously been convicted of three felonies. First, on September 28, 1936, he was convicted of burglary and larceny in the Circuit Court of Randolph County, Illinois, imprisoned therefore, and subsequently discharged. Second, on November 24, 1940, he was convicted of robbery,

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[1]*See footnote* 1, *page* 22.

not armed, in the Circuit Court of Randolph County, Illinois, imprisoned therefore, and subsequently discharged. Third, on October 25, 1945, he was convicted of larceny of an automobile imprisoned therefore, and subsequently discharged. **Gerberding v. State**, 448 S.W.2d 904, 906 (Mo. 1970); **Gerberding v. Swenson**, 435 F.2d 368 (8th Cir. 1970).

The jury was properly instructed to consider the prior convictions only with respect to the punishment to be imposed should petitioner be found guilty of the instant charge, and further, that the prior convictions should have no bearing upon the issue of his guilt or innocence of the instant charge.[3] On February 5, 1953, the jury returned its verdict finding the petitioner guilty of robbery in the first degree and determining that he had previously been convicted of a felony, and assessing his punishment at life imprisonment.

In the petitioner's state post-conviction proceeding it was determined that his 1936 conviction had been obtained while he was without assistance of counsel nor was waiver of assistance of counsel demonstrated. **Gerberding v. State, supra.** The Missouri Supreme Court, recognizing the voidness of the 1936 conviction held:

> "a certified copy of the 1936 judgment of conviction and the sentence was admitted into evidence at this hearing. It shows on its face that appellant appeared in person with no counsel when he entered his plea of guilty on September 29, 1936, in the Circuit Court of Randolph County, Illinois. On the hearing below, the state introduced no evidence tending to show that appellant had waived his right to counsel prior to the 1936 Illinois guilty plea."

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[3] *See footnote 2, page 22.*

"In this trial, which began February 2, 1953, more than fourteen years prior to the November 13, 1967 decision of Burgett v. Texas, the record shows as it was decided on appeal (272 S.W.2d 232, 233), that there was no question of appellant's guilt."

Gerberding v. State, 448 S.W.2d 904, 906 (Mo. 1970).

"... the court instructed the jury not to consider the prior offenses for any purpose whatsoever in arriving at a verdict. Here there was no objection upon any constitutional ground through the admission of state's Exhibit 30, the record of the 1936 Illinois conviction. Undoubtedly, that conviction, standing alone, under the Burgett case as the evidence in the present hearing tended to show, would be an insufficient basis for the jury to enhance the assessment of punishment. However, under the 1949 Second Offender Act, Section 556.280, **supra** only one conviction need be proved to authorize the jury to enhance punishment. (Citations omitted.) The ultimate fact to be established was the existence of one prior felony conviction. If, under the statute in this case, state's Exhibit 30 was improperly admitted into evidence because there was no counsel provided nor any effective waiver of the right to counsel, that error was not prejudicial to appellant because it was merely cumulative of other evidence of prior felony convictions now concededly without constitutional taint, and sufficient in that respect to establish at least one prior felony conviction as the jury found in its verdict." Ibid.

"...in this case, since there was a submissible case made of appellant's guilt of the 1951 armed robbery, and there was no undue emphasis of any prior convictions, made to the jury... this court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'..." **Gerberding v. State, 448 S.W.2d 904, 906 (Mo. 1970).**

The issuance of the application of the Second Offender Act and the sufficiency of the evidence to warrant its application to petitioner is a question of state law and its determination by the Supreme Court of Missouri is not subject to review in Federal Habeas. **Wilson v. Anderson,** 379 F.2d 330, Rev'd **Anderson v. Nelson,** 390 U.S. 523 88 S.Ct. 1133, 20 L.Ed.2d, 81 reh. den. 391 U.S. 929, 20 L.Ed.2d 670, 88 S.Ct. 1812 (1968); **Gueldner v. Heyd,** 311 F.Supp. 1168 (E. Dist. La. 1970).

Thus, the issue is whether admission into evidence of a conviction, which then admitted, but subsequently become void, which was not relied upon to either prove petitioner's guilt of the instant offense nor to enhance his punishment, constitutes harmless error.

Analysis of the legal issue should begin with the proposition that the procedure as defined by the then applicable Second Offender Act in Missouri was identical to that held constitutionally sufficient in **Spencer v. Texas,** 385 U.S. 554, 17 L.Ed.2d 606, 87 S.Ct. 648 reh. den. 368 U.S. 969, 18 L.Ed.2d 125, 87 S.Ct. 1015, 1016 (1967). The procedure constitutionally approved in that case involved the allegation of prior felonies in the information or indictment, introduction of evidence of prior convictions which necessitated the jury's awareness of the accused's prior convictions. The procedure approved also provided that the jury was to be instructed that the prior convictions were not to be considered in passing upon the accused's guilt or innocence on the primary charge. Mr. Justice Harlin on behalf of the majority, stated:

> "...No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases, such statutes and other enhanced-sentence laws, and procedures designed to implement

their underlying policies have been enacted in all the states, and by the federal government as well..." 385 U.S. at 559.

"Under Texas law the prior convictions of the defendants in the three cases before the court today might have been admissible for any one or more of these universally accepted reasons. In all these situations, as under the recidivist's statutes the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the state's purpose in permitting introduction of the evidence. The defendant's interests are protected by limiting instruction..." 385 U.S. at 561.

"It is contended nonetheless that in this instance the due process clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose — enforcement of the habitual-offender statute — is served. We recognize that the use of prior — crime evidence is a one-state recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of — sentence statutes may be available to the state that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a difference constitutional result." 385 U.S. at 563.

Thus, we submit that the procedure employed by Missouri in 1953 with respect to recidivist was constitutionally sufficient. In this case, petitioner was convicted in 1953. At the time of his original trial he made no objection to the introduction in evidence of his 1936 Illinois conviction. Gerberding v. State, 448 S.W.2d 904 (Mo. 1970). We should note that at the time of the introduction in evidence

of his 1936 Illinois conviction it was a valid conviction under **Betts v. Brady**, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252 (1942). That conviction became void some years later under the authority of **Gideon v. Wainwright**, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963).

We submit that the introduction into evidence of the 1936 Illinois conviction which subsequently became void constituted harmless error, because it is not necessary to rely upon that conviction to support the enhancement of punishment. Nor was the conviction used for the purposes of impeachment. The 1936 Illinois conviction was only one of three convictions received in evidence, the validity of the other two convictions and the propriety of their admission into evidence has previously been conceded by the petitioner. **Gerberding v. State, supra.** Finally, we should note that the appropriate limiting instruction was given by the court as to the effect to be accorded to the prior convictions. Accordingly, we submit that the 8th Circuit Court of Appeals in **Gerberding v. Swenson**, 435 F.2d 368 (8th Cir. 1970), correctly held that the admission into evidence of the 1936 Illinois conviction constituted harmless error. **Chapman v. California**, 386 U.S. 18, 17 L.Ed 705, 87 S.Ct. 824 (1967), reh. den. 386 U.S. 987, 17 L.Ed. 705, 87 S.Ct. 824; **Harrington v. California**, 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969).

Neither **Burgett v. Texas, supra,** nor **United States v. Tucker**, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), stand for the proposition that whenever a void conviction is received in evidence that it may never be considered to constitute harmless error.

This Court's decision in **United States v. Tucker, supra,** is of little persuasive authority in the instant case. This

is so because under the Missouri procedure in effect in 1953 by virtue of Section 556.280 RSMo 1949, all sentencing discretion was withdrawn from the trial court in that the maximum sentence was provided when the applicability of the Second Offender Act was determined. Whereas, under the facts in **Tucker**, the sentencing court would consider the prior convictions and exercise discretion in enhancing the penalty.

See **Garrett v. Swenson**, 459 F.2d 464 (8th Cir. 1972) distinguishing **Gerberding v. Swenson**, 435 F.2d 368 (8th Cir. 1970) from the existing Second Offender Act, Section 556.280, RSMo 1959.

> "Counsel for the state argues that reconsideration of petitioner's sentence is foreclosed by the court's decision in **Gerberding v. Swenson**, 435 F.2d 368 (8th Cir. 1970) cert. den., 403 U.S. 906, 91 S.Ct. 2211, 29 L.Ed.2d 682 (1971). That decision is clearly distinguishable from the case before us, however. In **Gerberding**, the trial judge, after considering three prior felony convictions, sentenced the defendant to serve the maximum sentence provided for the offense, as was required by the Missouri Second Offender Act in effect at that time. See Mo. Ann. Stat. Section 556.280 (1949). The defendant sought review of his sentence, arguing that one of the prior convictions was constitutionally invalid. This court denied relief on the narrow ground that the defendant had not been prejudiced by the consideration of the invalid conviction because, under the Missouri Second Offender Act, the trial court was required to impose the maximum sentence even if only one conviction were valid.
>
> The Missouri Second Offender Act was amended in 1959. See Mo. Ann. Stat. Section 556.280 (1959).
>
> The Act no longer requires a trial judge to impose the maximum sentence provided for an offense if the

offender is a prior felon. Instead, it vests the trial judge with the power to exercise discretion in sentencing prior felons. The reasoning of Gerberding is plainly inapplicable to cases involving discretionary sentencing." **Garrett v. Swenson,** 459 F.2d 464, 466, N. 3 (8th Cir. 1972).

For the same reason that Gerberding does not apply to cases involving discretionary sentencing the reasoning in **United States v. Tucker, supra,** does not apply in cases where discretion has been withdrawn from the sentencing court.

Therefore, the respondent submits that the decision below on the merits was clearly correct, that the petitioner presents no important federal question nor demonstrates conflict of decision and therefore the petition for writ of certiorari should be denied.

II

The successive motion on grounds previously heard and determined constitutes an abuse of remedy.

The District Court below in **Gerberding v. Swenson,** 342 F.Supp. 1165 (E. Dist. Mo. 1972) somewhat gratuitously, by resolving all doubts in favor of the petitioner, rendered a decision on the merits. The court noted: "It is the opinion of this court that even though the ground presently asserted may be supported by different legal arguments and couched in different language, it is basically the same ground that was decided adversely to petitioner on the merits by the Court of Appeals for the 8th Circuit, and, therefore, that decision could be of controlling weight here." **Id.** at 1166.

Under the principles announced in **Sanders v. United States**, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) and **Wilwording v. Swenson**, 446 F.2d 553 (8th Cir. 1971), it is submitted that the petitioner's successive motion on grounds previously heard and determined constitutes an abuse of remedy. The same ground previously presented in the subsequent application was determined adversely to the applicant on his prior petition. The prior determination was on the merits. The ends of justice were not served by reaching the merits on his subsequent application. As this court noted in **Sanders**, a ground for relief is simply a sufficient legal basis for granting the relief sought by the applicant. The example given was an allegation that an involuntary confession was admitted in evidence is a distinct ground for relief. A claim that this involuntary confession was predicated on psychological coercion does not raise a different ground than does one predicated on an allegation of physical coercion. The Court went on to note that identical grounds may often be proved by different factual allegations.

Correspondingly, it is submitted that this Court should deny the petition for certiorari in that the opinion of the Court below that the successive motion in effect constituted an abuse of remedy within the meaning of **Sanders v. United States, supra**, was clearly correct.

Since the decision below was clearly correct, and since the petitioner presents no important federal question or demonstrates conflict of decision the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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FOOTNOTES

[1]Section 556.280, RSMo 1949, provides as follows:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows:

"(1) If such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life;

"(2) If such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense;

"(3) If such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

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[2]The trial court gave the following instruction with respect to the effect of the prior convictions introduced into evidence:

"INSTRUCTION No. TWO

"The Court instructs the jury that in addition to the offense of robbery in the first degree by means of a dangerous and deadly weapon, the indictment charges that the defendant has been formally convicted of felonies and sentenced therefor. In this connection, you are instructed that if you find and believe from the evidence, beyond a reasonable doubt, that the defendant has been formerly convicted of a felony or felonies and was sentenced therefor, that fact alone will have no bearing upon the charge in this case, which is robbery in the first degree by means of a dangerous and deadly weapon. He is to be tried for the offense of robbery in the first degree by means of a dangerous and deadly weapon alleged in the indictment to have been committed on the 9th day of November, 1951, solely and only upon the evidence which is introduced before you at this trial pertaining to that offense. The fact of a former conviction or convictions, if you find it to be a fact, should be considered by the jury only as bearing upon the question of the amount of punishment you are to impose in case you find him guilty under the present indictment charging robbery in the first degree by means of a dangerous and deadly weapon alleged to have been committed on the 29th day of November, 1951.

"If, under instruction number one you find him guilty of robbery in the first degree by means of a dangerous and deadly weapon alleged to have been committed on November 29, 1951, and further find and believe from the evidence, beyond a reasonable doubt, that on the 28th day of September, 1936, in the Circuit Court of Randolph County, of the State of Illinois, the defendant was duly convicted of the offense of burglary and larceny, which offense, if committed in this State, would be punishable by the laws of this State by imprisonment in the penitentiary, and in accordance with said conviction was duly sentenced by said Court to an imprisonment in the Menard Branch

of the Illinois State Penitentiary of the said State of Illinois for the term of not less than one year nor more than life and was duly imprisoned in said Menard Branch of the Illinois State Penitentiary of the State of Illinois in accordance with said sentence; or that the defendant, on the 25th day of November, 1950, in the Circuit Court of Randolph County, of the State of Illinois, was duly convicted of the offense of robbery not armed, which offense if committed in this State, would be punishable by the laws of this State by imprisonment in the Penitentiary, and in accordance with said conviction was duly sentenced by said Court to an imprisonment in the Menard Branch of the Illinois State Penitentiary of the said State of Illinois for the term of one year to twenty years and was duly imprisoned in said Menard Branch of the Illinois State Penitentiary of the State of Illinois in accordance with said sentence; or that the defendant on the 25th day of October, 1949, in the Superior Court of Chatham County, of the State of Georgia, was duly convicted of the offense of simple larceny (larceny of an automobile) which offense, if committed in this State, would be punishable by the laws of this State by imprisonment in the penitentiary, and in accordance with said conviction was duly sentenced by said Court to an imprisonment in the Chatham County Public Works Camp of the said State of Georgia, for the term of one to five years and was duly imprisoned in said Chatham County Public Works Camp of the said State of Georgia in accordance with said sentence; and if you find and believe from the evidence in the present case, beyond a reasonable doubt, that the defendant committed the offense of robbery in the first degree by means of a dangerous and deadly weapon, charged to have been committed on November 29, 1951, then it is your duty to assess the maximum punishment prescribed for robbery in the first degree by means of a dangerous and deadly weapon, such punishment being imprisonment in the State Penitentiary for the remainder of his natural life."